No. 5633 (In Admiralty)

United States Circuit Court of Appeals

For The Ninth Circuit

TATSUUMA KISEN KABUSHIKI KAISHA, a corporation of the Empire of Japan,
Appellant,

—VS.—

ROBERT DOLLAR COMPANY, a corporation,
Appellee.

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLANT

COSGROVE & TERHUNE,
2002 L. C. Smith Building,
Seattle, Washington.

MCCAMANT & THOMPSON,
American Bank Bldg.,
Portland, Oregon,
Proctors for Appellant.

THE ARGUS, SEATTLE

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

About October 28, 1927, libellant filed in the lower court its libel in an action in rem against the steamer "HAKUTATSU MARU", her engines, boilers, etc. (Apostles p. 3). The vessel being attached, her owner, Tatsuuma Kisen Kabushiki Kaisha, appeared claiming said vessel and giving a release bond therefor. On June 4, 1928, the court sustained libellant's exceptions (Apostles p. 22) to claimant's amended answer

(Apostles p. 14). [Previously, on February 6, 1928, the court had sustained libellant's similar exceptions to claimant's answer (Apostle p. 23).] The claimant refusing to plead further, a decree was entered on September 18, 1928, in favor of the libellant against claimant (respondent) in the sum of $1580.68, with interest and costs (Apostles p. 28). From such decree this appeal is prosecuted.

The libel asserts that the libellant, on May 27, 1925, shipped on the "HAKUTATSU MARU" a certain lumber cargo from the port of Vancouver, British Columbia, to the port of Hongkong, China, with freight prepaid; that the lumber arrived at Hongkong about the 13th of September, 1925; that libellant demanded delivery

> "but said vessel refused to deliver same until an additional sum of $1580.68 was paid;"

that libellant paid said amount under written protest on or about the 17th of September, 1925;

> "that the said vessel has refused and still refuses to reimburse libellant for the amount thus wrongfully collected."

The prayer is for a money decree against the "HAKUTATSU," her attachment and sale.

The amended answer (Apostles p. 14, *et seq.*) makes certain denials and sets up the two following separate affirmative defenses:

> "First Affirmative Defense
>
> "That if libellant's libel states a cause of action, it is not one cognizable in admiralty.
>
> Second affirmative defense

I.

"That the goods mentioned in said libel were shipped from Vancouver, B. C., in 1925, on said vessel 'HAKUTATSU MARU' for delivery at Hongkong, China, pursuant to an agreement between the said libellant and the said claimant, through its agent, Walker-Ross, Inc., as evidenced by a bill of lading dated May 27, 1925, issued by said claimant through its said agents (and accepted by said libellant), in favor of said libellant, providing for the carriage of said goods from said Vancouver, B. C., to Hongkong, China, all according to the terms and conditions particularly set forth in said bill of lading; that said agreement of transportation as evidenced by said bill of lading, provided, among other things, the following:

" '8. If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged, then first; all merchandise not discharged may be retained on board vessel and returned to her port of original shipment or same may be at option of ship's master or agent and at owners cost and risk be conveyed upon such or any vessel to any

other port and thence to said port of delivery; or, second, same may be forwarded to and landed and delivered or stored at any other port at owner's cost and risk and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchandise or any thereof be so returned to such port of original shipment no additional freight shall be charged, and that delivery or storage of such merchandise at any such other port or on such return to such port of original shipment shall be a final and sufficient delivery. In case any part of the merchandise cannot be found for delivery during vessel's stay at port of discharge, same may be forwarded at Carrier's expense, but no liability shall exist for any loss or damage resulting from delay.'

II.

"That said vessel 'HAKUTATSU MARU,' shortly after May 27, 1925, sailed for Hongkong, China, and while on said voyage, arrived at the port of Kobe, Japan, on the 29th day of June, 1925.

III.

"That at the time said vessel arrived at Kobe and for some time prior thereto, a general strike existed in all Chinese ports, including the port of Hongkong; that in each of said ports said strike was of unusual violence and particularly directed towards British and Japanese vessels; that British and Japanese vessels arriving at said Chinese ports, including the said port of Hongkong, were

unable to discharge their cargoes; that at said times there was in said ports, including Hongkong, much rioting, civil war and chaos; that Kobe was on the usual and customary route of said vessel on the voyage from Vancouver, B. C., to Hongkong; that said Chinese ports, on account of said strikes, riots, civil war and chaos, being in effect closed, the said port of Kobe, upon the arrival of said vessel, was the only remaining near and safe port on said customary route of said vessel on which the said vessel might land and store the said goods of said libellant.

"That the ports of Shanghai and Kelung, Formosa, were somewhat nearer to the port of Hongkong than the port of Kobe, but said vessel would have had to widely deviate from her usual and customary route in order to reach said ports, and further, the charges for discharge, storage and loading of said cargo at each of said ports was many times more than the charges for the same service at Kobe; and therefore the said ports of Shanghai and Kelung were not either at or near the said port of Hongkong.

"That said general strike, rioting, warfare and chaos continued as stated above from June 29, 1925, to September 13, 1925.

IV.

"That upon the arrival of said vessel at the port of Kobe, the master thereof made due inquiry and was informed of the facts set forth in the preceding articles; and because of said infor-

mation it was his judgment and the judgment of the agents of said vessel that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of said goods or any part thereof; that in their judgment it was likewise unsafe and impracticable to proceed to any other Chinese port and there make said delivery of said goods, or any part thereof; that there was no port available, safe and nearer to Hongkong for the discharge and storage of said goods than Kobe; that by reason of the foregoing the said vessel 'HAKUTATSU MARU' retained the goods mentioned in said libel on board at Kobe, Japan, until July 21, 1925, at which time said goods were discharged from said vessel and placed in warehouse and/or lumber pool and kept there until August 31, 1925, at which time said goods were taken from said warehouse and/or lumber pool and placed aboard the vessel "SOMEDONO MARU' for shipment to Hongkong, China; that said last mentioned vessel proceeded, arriving at the port of Hongkong, China, on the 13th of September, 1925, and there delivery of said goods was made to the said libellant without any charge whatever for the carriage of said goods on the said vessel 'SOMEDONO MARU;' that the said goods were retained and stored in the port of Kobe as hereinbefore stated because of the above mentioned reasons, and none other.

V.

"By reason of the foregoing, said vessel 'HAK-

UTATSU MARU' and claimant were obliged to and did pay for the discharge, lighterage, storage and reloading of said cargo at the port of Kobe, the sum of 3,870.50 yen, or $1580.68, which was the reasonable and necessary cost thereof.

VI.

"That the said vessel 'HAKUTATSU MARU' and her owner, the claimant herein, upon paying said costs and expenses of discharge, lighterage, storage and reloading of said goods, acquired under said bill of lading a lien against said goods in the amount of said payments so made, and upon the arrival of said goods at Hongkong, China, the said 'SOMEDONO MARU' and the said claimant refused to deliver the same until they were reimbursed for said payments; that the payment which the said libellant made at Hongkong, and particularly referred to in Article III of its libel, was by way of reimbursement to said 'HAKUTATSU MARU' and her owners for said costs and expenses so paid by them, and in satisfaction of said lien against said goods, and not otherwise.

VII.

"That neither the said vessel 'HAKUTATSU MARU' nor her owners, the said claimant, are indebted to the said libellant by reason of said payment mentioned in said libel in the sum of $1580.68, or in any sum at all.

VIII.

"That at all the times herein mentioned, the

said claimant, Tatsuuma Kisen Kabushiki Kaisha, was and now is a corporation of the Empire of Japan, and the owner and operator of said vessels 'HAKUTATSU MARU' and 'SOMEDONO MARU.'

IX.

"All and singular the premises are true."

Libellant's exceptions to claimant's amended answer (Apostles p. 22) follow:

I.

"Paragraph 8 of the bill of lading, quoted in claimant's so-called second affirmative defense, is inapplicable to the facts set forth in paragraphs 2, 3, 4, 5 and 6 of its second affirmative defense, in that paragraph 8 of said bill of lading contemplated that the SS. 'HAKUTATSU MARU' would actually proceed to the port of delivery. Said paragraph 8 of the said bill of lading cannot be invoked by said vessel, her master or owner, where the said vessel has utterly failed to proceed to the port of delivery, and the discretion therein contemplated cannot be invoked unless and until said vessel be at said port of delivery.

"Libellant therefore excepts to the said so-called second affirmative defense, and prays that said claimant may be obliged to file a further answer to the said libel."

The court's oral decision sustaining exceptions (June 4,1928) is as follows (Apostles p. 25):

"This cause of action arises out of a maritime

contract, and it is the subject of admiralty jurisdiction. The bill of lading provides:

" 'If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at the said port or for same to be there safely landed if discharged,' etc.

"The amended answer sets forth that there was a general strike in all Chinese ports, including the port of Hongkong; that in each of said ports rioting, strikes and civil war existed, and that such violence was particularly directed toward British and Japanese vessels; that upon the arrival of the 'HAKUTATSU MARU' at the port of Kobe, Japan, the master thereof made due inquiry, and was informed of the existence of conditions at Hongkong and all other Chinese ports, and because of said information it was his judgment that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of the cargo, and as a consequence the cargo was discharged at Kobe, Japan.

"The bill of lading expressly authorized the master to exercise his judgment as to the safety of landing the cargo only after the ship had ar-

rived at Hongkong. The parties contemplated that the vessel should proceed to Hongkong and ascertain conditions before the master would be permitted to use his discretion as to the advisability of landing his cargo elsewhere.

"This opinion may be inconsistent with my former holding, but, after further consideration of the bill of lading, I am convinced that it will bear no different interpretation from the one now given.

"The exceptions to the amended answer will be allowed."

A previous decision of the court (February 6, 1928) on similar exceptions to claimant's similar affirmative defense set forth in its answer, follows (Apostles p. 23):

"If the facts set forth in the answer of claimant are true, it appears that the master of the vessel determined, while at Kobe, Japan, that it would be unsafe to deliver his cargo at Hongkong. The question of determination is whether Kobe can be regarded as near the port of delivery within the meaning of the bill of lading.

"This is a case where the vessel entered into an agreement to deliver a cargo at a port in the Orient at a time and place where the hazards of the undertaking were unusual. Therefore, in construing the contract, the Court should look to the language employed and the conditions that were obviously anticipated by the parties at the time the contract was made.

"The port of Kobe was more than one thousand mile from the port of delivery.

"If Kobe was the nearest port at which delivery of the cargo could have been made, it would, in my judgment, be near the port of delivery as intended by the parties. However, there are ports in China—Shanghai and several others—where possible delivery might have been made. If the cargo could have been discharged at one of these ports, Kobe would not be near the point of delivery. In other words, it would have been the duty of the master of the ship at the time to discharge the cargo at the nearest safe port to Hongkong. Whether or not Kobe was the nearest safe port is not disclosed by the claimant's answer.

"The contract contemplates that the shipper shall suffer as little convenience and expense as possible by reason of existing conditions.

"There are no definite allegations in the answer to the effect that ports nearer Hongkong than Kobe were unsafe for the discharging of the cargo. It is merely set forth that the strike at Hongkong was widespread, and that much rioting, civil war and chaos existed in China. This allegation might be generally true, and it yet be true that cargo might have been safely discharged at one of the ports referred to, in which event it would have been the duty of the master of the ship to discharge the cargo at the nearest port.

"The exceptions of claimant's answer will be allowed."

ASSIGNMENT OF ERRORS (Apostles p. 35)

(1) The District Court erred in sustaining the exceptions to claimant's amended answer to the amended libel.

(2) The District Court erred in making and entering its final decree in favor of libellant and against claimant on the 18th day of September, 1928.

ARGUMENT

The Amended Answer Cures Defects of Original Answer

The original answer, in Paragraph I of the affirmative defense thereof, sets up the bill of lading, and particularly Article 8 thereof. In Paragraph III of said affirmative defense, claimant alleged, among other things, the general strike, riot, violence, etc., directed toward British and Japanese vessels at the port of Hongkong, notice thereof to the master at the time of the arrival of the vessel at Kobe, the necessity for discharge and the resulting charges caused thereby. The court, in passing upon exceptions directed to this affirmative defense (Apostles p. 23), stated that

> "there are ports in China—Shanghai and several others—where possibly delivery might have been made. If the cargo could have been discharged at one of these ports, Kobe would not be near the point of delivery. In other words, it would have been the duty of the master of the ship at the time to discharge the cargo at the nearest safe port to Hongkong. Whether or not Kobe was the nearest safe port is not disclosed by the claimant's answer. * * * There are no definite allegations in the answer to the effect that ports nearer Hongkong than Kobe were unsafe for the discharging of the cargo. * * *"

After the opinion above mentioned was rendered, the claimant filed its amended answer, upon which

it stood. It sets up allegations which meet all of the objections voiced by the court.

In addition to the foregoing it will be noticed that the vessel when at Kobe was on her usual route, and to have gone to other ports than those on her usual route would have been to effect a deviation, which, in itself, under well-known rules of law, would have destroyed the carrier's right of all defenses under its bill of lading. The carrier owed to all shippers of cargo on the vessel, including the libellant, the duty of proceeding to destination along the usual and customary route. This did not admit of deviation.

AS TO THE JURISDICTION OF THE COURT—BROUGHT TO THE ATTENTION OF THE COURT THROUGH CLAIMANT'S FIRST AFFIRMATIVE DEFENSE TO SAID AMENDED LIBEL.

This defense is:

> "that if libellant's libel states a cause of action, it is not one cognizable in admiralty."

The action is in admiralty in rem, and running directly against the "HAKUTATSU MARU." There is no action in personam. The court sitting in admiralty has no jurisdiction over any causes of action except those which are maritime.

In the case of *The T. W. Lake*, decided by the Circuit Court of Appeals for the 9th Circuit, 1927 A. M. C. 57, we find the court dismissing for want of jurisdiction in admiralty a libel in personam brought upon two policies of insurance—one upon the hull of the vessel, upon which the appellant had paid a certain sum, and the other a policy covering marine risks for

disbursements and/or earnings, upon which the appellant had paid a certain sum. The libel alleged that the vessel so insured was, with the privity of the insured, sent to sea in an unseaworthy condition, and because of such she sank and became a total loss, and that the appellant paid said sums without knowledge or means of knowing that said vessel was sent to sea in an unseaworthy state and upon the representation of appellee that it had complied with all of the provisions of the policies and the law applicable thereto, etc., and in ignorance, misapprehension, misinformation and a mistake of the true fact paid said losses, and that the appellee held said sums to the appellant's use as and for money had and received. The court said:

> "Jurisdiction in admiralty in cases of contract depends upon the nature of the contract 'and is limited to contracts, claims and services purely maritime, and touching the rights and duties appertaining to commerce and navigation.' "

The court pointed out that although a contract of marine insurance is a maritime contract, a contract to procure such insurance is not enforcable in admiralty; that a contract by carrier by water to procure insurance on goods received for transportation is not a maritime contract. It quoted from Judge Story, *Plummer v. Webb*, 4 Mass. 380:

> "In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

It pointed out that an action to reform a policy of marine insurance is without the jurisdiction of admiralty, and said:

> "Courts of admiralty cannot entertain an original bill or libel for specific performance to correct a mistake, or to grant relief against a fraud."

It referred to *United Transportation & Lighterage Co. v. New York & Baltimore Transportation Line*, 185 Fed. 386, saying:

> "It was held that admiralty has no jurisdiction over non-maritime transactions following the execution of maritime contracts. This was held in reference to a counterclaim for damages on account of excessive charges paid to libellant by the respondent under a prior contract between them, which contract was alleged to be void and fraudulent for the reason that the respondent's general manager, who made it, was also an officer of the libellant and betrayed the trust imposed in him by the respondent. Said the court, 'The matter is not maritime * * *' * * * The appellant admits that its causes of action are in the nature of assumpsit for money had and received, and contends that while it is true that the libel alleges that the appellee made incorrect proofs of loss and that the payments were made under 'misapprehension, misinformation, mistake and ignorance of the facts,' those allegations are not the basis of the causes of action but are inserted to show admiralty jurisdiction in that the question of the right to recover involves the con-

> struction of maritime contracts and the application of principles of maritime law."

The court held that it did not have jurisdiction, the cause being essentially one at law.

In *Boera Brothers v. U. S.*, 1924 A. M. C. 1474, decided by the United States District Court, Eastern District of New York, it appears that the shipper, which was the libellant, shipped on the steamer of the claimant certain goods, and the libellant was obliged to pay the claimant, under duress, mistake of fact and under protest, wharfage, which the carrier alleged to be due on certain of the goods shipped. The action was for the recovery of the money so paid. Claimant excepted, asserting that the cause of action was not within the admiralty maritime jurisdiction. The court said:

> "There can be no question raised as to the right to sue in admiralty for wharfage, but this is not a suit for wharfage, but a suit to recover money alleged to have been paid for wharfage under duress, mistake of fact and under protest, when the respondent was not entitled to any wharfage on certain specified crates. The libellants are not asking to enforce a maritime contract, nor to obtain an accounting as incident to a maritime contract, nor are there any allegations contained in the libel, which, in my opinion, are sufficient to give an admiralty court jurisdiction of the cause of action for the recovery of said money."

The exception was sustained.

In the *New York & Baltimore Transp. Line, Supra*, the court said:

> "Perhaps, as we have also seen, an action in assumpsit for money had and received would lie. But a court of admiralty cannot afford the necessary equitable relief; nor can it grant the legal relief, because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract."

Libellant, having selected its forum, chosen its adversary and alleged certain particular facts and prayed for a money judgment, cannot upon exceptions to an answer change the form of action, forum or pick a new adversary. The libel asserts an action in assumpsit as for money had and received, the same being a cause of action foreign to the admiralty court. Because the bill of lading might come in for construction, the cause of action does not necessarily become maritime, as shown in the decision of Judge Story in *Plummer v. Webb, Supra.* Furthermore, this action is in rem against the "HAKUTATSU MARU" notwithstanding the fact that the allegations of wrong, overcharge, claim for money had and received, or whatever they may be, must be laid to the "SOMEDONO MARU" or to the carrier (which are individuals not parties hereto), but not to the "HAKUTATSU MARU." *There is no claim for damages because of the discharge, storage and placement of the goods upon the vessel* "SOMEDONO MARU." The action is as stated—one for money had and received, which having and receiving took place at Hongkong on the arrival of the "SOME-

DONO MARU." The allegations of the libel show no lien in the libellant against the vessel "HAKUTATSU MARU" on account of the claimed overcharges at Hongkong.

SECOND AFFIRMATIVE DEFENSE

For a better understanding of Paragraph 8 of the bill of lading we divide the same into what we deem to be its component parts, giving to the first two portions the designations (a) and (b).

> (a) "If the vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival *at or near* the same, or from discharging any or all of said merchandise, * * *
>
> (b) "Or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged,
>
> * * *
>
> "All merchandise not discharged may be retained on board vessel and returned to her port of original shipment or same may be at option of ship's master or agent and at owner's cost and risk be conveyed upon such or any vessel to any other port and thence to said port of delivery; or second, same may be forwarded to and landed and delivered or stored at any other port at Owner's cost, and risk, and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchan-

dise or any part thereof be so returned to such port of original shipment no additional freight shall be charged."

Paragraph III of the second affirmative defense states that a general strike, rioting, civil war and chaos existed in all Chinese ports, including Hongkong, at the time said vessel arrived at Kobe on September 13, 1925, and that British and Japanese vessels arriving at Hongkong were unable to discharge their cargoes. That was a constructive prevention of the vessel from discharging at Hongkong or any other Chinese ports all or any of said merchandise, and likewise was a constructive prevention of the vessel from entering said port of delivery, all under said Sub-division (a) of Paragraph 8 of said bill of lading.

Paragraph IV of said second affirmative defense states:

"That upon the arrival of said vessel at the port of Kobe, the master thereof made due inquiry and was informed of the facts set forth in the preceding articles; and because of said information it was his judgment and the judgment of the agents of said vessel that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of said goods or any part thereof; that in their judgment it was likewise unsafe and impracticable to proceed to any other Chinese port and there make said delivery of said goods, or any part thereof; that there was no port available, safe and nearer to Hongkong for the discharge

and storage of said goods than Kobe; that by reason of the foregoing the said vessel 'HAKUTATSU MARU' retained the goods mentioned in said libel on board at Kobe, Japan, until July 21, 1925, at which time said goods were discharged from said vessel and placed in warehouse and/or lumber pool and kept there until August 31, 1925, at which time said goods were taken from said warehouse and/or lumber pool and placed aboard the vessel 'SOMEDONO MARU' for shipment to Hongkong, China; that said last mentioned vessel proceeded, arriving at the port of Hongkong, China, on the 13th of September, 1925, and there delivery of said goods was made to the said libellant without any charge whatever for the carriage of said goods on the said vessel 'SOMEDONO MARU'."

This brings the defense within Sub-division (b) above quoted. Paragraph V of the second affirmative defense states:

"That by reason of the foregoing said vessel 'HAKUTATSU MARU' and claimant were obliged to and did pay for the discharge, lighterage, storage and reloading of said cargo at the port of Kobe, the sum of 3,870.50 yen, or $1580.68, which was the reasonable and necessary cost thereof."

These two paragraphs bring the defense within the latter portion of said paragraph 8 of said bill of lading.

WAR AND DISTANCES

The court will take judicial notice of war, strife,

etc., at Hongkong and other Chinese ports during the summer of 1925, and will also take judicial notice of the distances from

Vancouver to Kobe.....4600 miles
Kobe to Hongkong.....1372 miles
Yokohama to Hongkong.....1585 miles

In the *Yaquina*, 1925 A.M.C. 1419, under a clause in the bill of lading relieving the ship from the obligation to discharge cargo

> "if it shall be impossible or unsafe in the opinion of the master to discharge,"

the owners of cargo may not question the advisability of the master's action if based upon judgment exercised in good faith and in a reasonable manner.

In *The West Cawthon*, 281 Fed. 894, we find a vessel with cargo from the Orient to Havana. When the vessel reached Cienfuegos, Cuba, the master learned that the congestion in the harbor of the latter place was so great and the available discharging and warehousing facilities so limited that it would not be possible under the existing port regulations, for perhaps months, either to deliver the cargo or get out of the harbor. He discharged the cargo at Cienfuegos, and the court held that the master showed good judgment.

In the well known case of the *Kronprinzessin Cecilie*, 244 U. S. 12, 61 L. Ed. 960, we find the master of the vessel leaving the United States with a very valuable cargo of gold for delivery in England and France, turning back to America when but 1070 miles from Plymouth, England, upon the receipt of a wireless message from the vessel's owners that war had been declared by Austria against Servia, etc. It was

claimed that the vessel did not comply with the obligations of a carrier and the bill of lading contained the arrest and restraint of princes clause. The court held the master justified even though he might possibly have been able to land the gold at Plymouth a few hours before the declaration of war by Germany against England.

> "It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. *Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs.* * * *
>
> "We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man."

In the English case of *Nobel's Explosives Co. Ltd. v. Jenkins & Co.*, decided by the Queen's Bench Division in 1896, reported in Aspinall's Reports of Maritime Cases, Vol. 8 (N. S.) page 181, we find the ves-

sel carrying explosives from London to be delivered at Yokohama or "so near thereto as the vessel may safely get." The bill of lading contained the "restraint of rulers, princes, or people" exception, and a clause that, "if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port." Several Chinese cruisers were near and the master entertained the belief that if he proceeded the vessel would be stopped and the explosives confiscated. He therefore landed the explosives at Hongkong and proceeded on his way to Yokohama. The action was to recover the expenses of storage and subsequent forwarding of the goods to Yokohama. The contention was made there as in the present case that the master could not exercise his judgment until arrival at Yokohama, the port of destination for the explosives. In holding that the master exercised his judgment properly and it was not necessary for him first to proceed to the port of Yokohama, the court stated:

> "There was a further clause in the bill of lading upon which the defendants rely, and which seems to me to afford a further answer to the plaintiff's claim. (His Lordship then read the following clause from the bill of lading: 'If the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port.') It was said that this clause was only intended to apply where difficulties arose upon the vessel's

arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to limit his discretion to the case where the information reached him on his arrival off the port of destination. But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship and her cargo would be detained, and the goods of the plaintiffs confiscated. In the words of Willes, J., in delivering the considered judgment of the Exchequer Chamber, in *Notara v. Henderson* (26 L. T. Rep., at p. 446; L. Rep. 7 Q. B., at p. 237), 'A fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience must be taken into account.' I am of opinion that the course taken by the captain in

landing the goods and leaving them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers because they had protested against the discharge of these goods. But even if this information had reached the captain, it would not have divested him of his original authority and his right to act in any emergency as agent for the owners of ship and the other owners of cargo. I therefore give judgment for the defendants with costs."

DISTANCES

Distances in the Orient are great in miles, but not otherwise. In these modern times with fast moving vessels, wireless and cable, nautical mileage is reduced to a minimum.

INFORMATION AVAILABLE AT KOBE

When the master arrived at Kobe the conditions at Hongkong were easily made available to him through the wireless and the cable, and he could receive by such means all information that he could have received had he actually tied his vessel to the dock at Hongkong.

WHERE IS "AT OR NEAR?"

Under libellant's definition, the vessel to have been "at or near" Hongkong must have been tied up to the dock in that city. Had that happened the vessel would have been subject to all of the dangers and hazards of the strike, rioting and warfare then existing in that port. Under libellant's definition the vessel could not be at Kobe, nor could it be a mile from the Hongkong

dock, nor could it be one hundred yards from the Hongkong dock. Suppose the master had taken the vessel on to Hongkong, into the harbor, up to the dock, all according to the definition of "at or near" of libellant—what more information could he have received as to Hongkong conditions which he could not have received at Kobe? The answer, of course, is: Nothing.

Suppose, at Kobe, the master should have learned, as he did in this case, that he could not discharge at Hongkong—why should he take his vessel and his valuable cargo on a voyage of 1372 miles to Hongkong and 1372 miles back again, with the ship, its cargo and crew meanwhile subjected to the perils and hazards of the sea?

It cannot be denied that neither party would knowingly enter into a contract to its own disadvantage. No steamship company would have sent its vessel from Kobe to Hongkong to get the information which it then already had, just to be "at or near" Hongkong. No shipper, having an interest in his goods, would want any steamship company to take his goods upon such a fool's errand. Therefore, in the application of common sense, it appears that the term "at or near" must be held in this case to include the port of Kobe; that the vessel at Kobe was constructively prevented from the entering and/or discharging its cargo at the port of Hongkong; that the exceptions should have been denied.

Respectfully submitted,

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McCAMANT & THOMPSON,

Proctors for Appellant.

Howard & Cos